85-1078

No. 85-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BLUE BELL, INC.,

Petitioner,

vs.

FRANK WILHELM and HAROLD L. KOGUT.

Petition For A Writ of Certiorari To
The United States Court of Appeals
For the Fourth Circuit

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QUESTION PRESENTED

In the **absence** of evidence tending to show any pattern of discharging older employees, and where no evidence tends to prove any employment policy or practice that had a "disparate impact" upon older employees, and where no evidence even suggests that younger employees with similar performance deficiencies retained their jobs; but where, instead, incontrovertible record evidence establishes:

> (1) That an "under forty" employee was discharged at exactly the same time and for precisely the same reasons as an "over forty" claimant; and
>
> (2) That another "over forty" claimant was discharged after his undeniable and unexplained failure and refusal to make the number of sales calls specifically required by his manager;

Should not the trial court exercise proper "jury control" and direct a verdict or enter judgment notwithstanding the verdict upon the employer's timely motions?

PARTIES TO THE PROCEEDING[1]

In addition to the parties set forth in the caption of this Petition, Karl F. Gatlin appeared as a plaintiff in the trial court. The jury, however, found that Gatlin had not filed a timely age discrimination charge with the Equal Employment Opportunity Commission. Accordingly, upon Gatlin's claim, judgment was entered for Blue Bell, and Gatlin's claim was not at issue in the Circuit Court.

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[1] In compliance with Rule 28.1, according to information supplied to counsel of record for Blue Bell, Inc., it has no parent company, subsidiaries, or affiliated corporations.

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SUPREME COURT OF THE UNITED STATES
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No. 85-

BLUE BELL, INC.,

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vs.

FRANK WILHELM and HAROLD L. KOGUT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that the Court may review a decision rendered by the Circuit Court in a case involving the parties above-

named, and the Petitioner respectfully shows to the Court:

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 773 F. 2d 1429 and may be found in the Appendix filed herewith (Pet. App. 1-27).[2] The District Court's Orders entered subsequent to the jury's verdicts are not reported but also may be found in the Appendix (Pet. App. 28-57).

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant provisions of the Age Discrimination in Employment Act of 1967 (29

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[2]"Pet. App." refers to the Appendix filed with this Petition.

U.S.C. §621 et seq.) ("ADEA" or "the Act") are as follows:

Section 4 of the Act, 29 U.S.C. §623, provides in pertinent part:

> ". . . It shall be unlawful for an employer --
>
> (1) . . . to discharge any individual . . . because of such individual's age;
>
> * * *
>
> It shall not be unlawful for an employer . . . --
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age . . .; [or]
>
> * * *
>
> (3) to discharge . . . an individual for good cause."

STATEMENT

A.

Proceedings Below

Frank E. Wilhelm (hereinafter "Wilhelm") alleged that Blue Bell, Inc. (hereinafter "Blue Bell") had discharged him because of his age in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621, et seq. Wilhelm also alleged that his discharge was without just cause and violated an implied covenant of good faith and fair dealing.

Harold L. Kogut (hereinafter "Kogut") later intervened, also alleging that his discharge violated the Act and, further, that Blue Bell had terminated his employment in retaliation for his having given deposition testimony in Wilhelm's lawsuit.

The District Court dismissed the pendent "just cause" claims. Subsequently, a jury returned verdicts in favor of both

Wilhelm and Kogut (See Pet. App. 29-31). Having previously made timely motions for directed verdicts, Blue Bell moved for judgment notwithstanding the jury's verdicts. Blue Bell's j.n.o.v. motion was denied (Pet. App. 55-57), and the District Court entered final judgment awarding Wilhelm and Kogut backpay, reinstatement, attorneys' fees and costs (Pet. App. 29-54).

Upon jury findings that Blue Bell willfully had violated the Act (See Pet. App. 29-31), the District Court awarded Wilhelm and Kogut liquidated damages equal to their backpay awards (Pet. App. 29-36). Blue Bell gave notice of appeal to the United States Court of Appeals for the Fourth Circuit, and the District Court entered an Order granting a stay of the judgment pending appeal (Pet. App. 28).

The Circuit Court affirmed "the district court's denial of Blue Bell's motion

for judgment notwithstanding the verdict" but remanded "the case for a new trial", upon the liquidated damages issue only, "under a proper willfulness instruction" (Pet. App. 26-27).

B.

The Factual Background

This case presents two "disparate treatment" claims of allegedly intentional employment discrimination. Those claims are that two former Blue Bell salesmen were discharged **because** they were "over forty", and that, in addition, Kogut was discharged in retaliation for his having given deposition testimony in Wilhelm's lawsuit.

There has been absolutely no evidentiary showing that Blue Bell engaged in any pattern of discharging "over forty" salesmen. Furthermore, there has been no claim or showing that Blue Bell's discharges of two salesmen reflected any employment

practice or policy having a "disparate impact" upon "over forty" salesmen. Indeed, the record evidence is exactly to the contrary.

From the year 1977 through the end of 1983, Blue Bell discharged a total of six Southeastern Region Boyswear salesmen; **only** the two claimants in this case were "over forty", and the other four discharged salesmen were "under forty". It also is indisputable that in Kogut's division, **after** he and an "under forty" salesman had been terminated for precisely the same reasons, **all** of the remaining salesmen were "over forty". There is absolutely no record evidence tending to show that **any** "under forty" salesman whose performance was similar to either Wilhelm's or Kogut's remained in Blue Bell's employ. Furthermore, it is (at the least) relevant that both Kogut and Wilhelm were

"over forty" when they initially were hired as Blue Bell salesmen.

The record decidedly does not establish that Wilhelm or Kogut were subjected to any "disparate treatment". Neither of them denied the performance deficiencies that ultimately resulted in their discharges. Their cases were premised entirely upon their irrelevant past performances and "accolades" and upon somewhat favorable -- but notably selective -- elements of their performance immediately prior to their discharges.

During seven of his eleven years as a Boyswear salesman, including prosperous times when orders literally had rolled in, Kogut had failed to achieve his commission goal. Indeed, in his last two complete years as a salesman, Kogut achieved, respectively, only about sixty percent and fifty percent of his commission goals. He and an "under

forty" salesman were discharged for failure to fulfill specified standards during an eight-week evaluation. Blue Bell's standards were specific and objective and Kogut needed only to mechanically comply with them.

Rather than reflecting any "disparate treatment" affecting Kogut, the record conclusively establishes that Kogut was afforded exactly "the identical treatment" afforded salesman Randy Cloud. Cloud was thirty-six when he was discharged and had served as a Southeastern Region Boyswear salesman for approximately nine years until, on the same day as Kogut, he was discharged because of similar substandard performance during an eight-week evaluation. Both Kogut and Cloud were evaluated upon identical criteria, during an indentical eight-week period, and both received interim counselling with respect to their failures to fulfill the

evaluation standards. Both Kogut and Cloud were discharged on the same day and for the same reason. It is indisputable that Kogut and Cloud were afforded exactly parallel treatment.

With respect to Kogut's "retaliation" claim, the unrebutted record evidence is that Blue Bell's management made a conscious decision **not** to terminate Kogut for an insubordinate, purely voluntary election to attend a deposition (for which he had not been subpoenaed) rather than to attend a scheduled Company meeting. Moreover, the uncontradicted evidence remains that Blue Bell discharged both Kogut and an "under forty" salesman as a result of their similar substandard performances during an eight-week evaluation.

The circumstances resulting in Wilhelm's discharge were different, but just as surely fail to reflect any "disparate

treatment". Wilhelm had been placed on probationary status because he had failed to meet performance goals established by his supervisor. While failing to meet those goals, Wilhelm also had been the lowest performer in his Region, and these circumstances resulted in the decision to place him on probation.

Although Wilhelm's probation apparently motivated him to improve his performance, that performance immediately and noticeably again deteriorated when his probation ended. Specifically, Wilhelm and all other Southeastern Region salesmen were instructed in late December, 1981, to go "on the road" immediately after the New Year and to make twenty "line presentations" per week. Based on his own contact reports, Wilhelm made only one such line presentation during the first week of January, two

during the second week, and only four during the third week of that month.

Wilhelm did not and could not contradict the above-summarized evidence but did assert that he was twenty-one percent ahead of his previous year's performance when he was discharged. This evidence, however, only tends to establish that he was twenty-one percent ahead of production figures that undeniably had resulted in his being placed on probationary status -- that is, he was about twenty percent ahead of production figures which, except for his later improvement during the probationary period, would have resulted in his earlier discharge.

The essential thrust of Wilhelm's proof, which almost certainly influenced the jury, was that in past years he had received various sales awards. Such proof is marginally relevant, at best, and reflected performance during times when Blue Bell's

salesmen could simply record large orders from large customers without developing and working their territories. When changed business conditions dictated that Blue Bell's salesmen should actively develop and travel within their territories, Wilhelm resisted any changes in his modus operandi and, as the record conclusively establishes, disregarded specific management directives concerning the number of calls he was expected to make. Wilhelm's recalcitrance led him from probation to discharge; and there is clear evidence that his discharge was because of his desultory job performance.

Although Wilhelm and Kogut engaged in extensive discovery, they were unable to offer any evidence that any "under forty" salesman remained in Blue Bell's employ with a performance record similar to Kogut's or Wilhelm's.

REASONS FOR GRANTING THE WRIT

This Case Reveals a Clear Need for the District Courts Scrupulously to Consider Whether a Finding of Intentional Age Discrimination Could Be Said To Be Supported By "Rationally Probative" Evidence, in Order to Assure that Jury Verdicts Will Not Be Based Upon "Sympathy" or Upon Improperly Subjective Perceptions of Employers' Decisions

A.

This Case Presents An Important Question of Federal Law That Should Be Settled By the Court

Blue Bell respectfully and earnestly urges that the Court's discretion should be advised to review this case, because a significant federal issue is squarely presented. It is suggested that the issue of proper "jury control" in age discrimination cases needs to be addressed by the Court. This "disparate treatment" case is a peculiarly appropriate vehicle for consideration of the issue. This is because there is in the present case absolutely no evidence -- which

might be said to support jury verdicts in other cases -- of any pattern of employment discrimination because of age or of any employment policy or practice having a "disparate impact" upon older employees. Thus, the sufficiency of the evidence in this case would be reviewed in the context of employment decisions affecting individual claimants in largely undisputed factual circumstances.

It also is believed to be pertinent that quite substantial damages verdicts have been returned in this case, and it is respectfully suggested that such awards in other similar cases invite attention to the concern that juries may be deciding age discrimination claims "by impermissible but understandable resort to such factors as sympathy and the like" (See Lovelace v. Sherwin-Williams Co., 681 F. 2d 230, 242 (4th Cir. 1982)). Indeed, there seems to be an

increasingly widespread perception among judges and lawyers that juries may too easily and improperly be persuaded that an employment decision has been made "because of age".

The Court has, of course, previously addressed issues relative to "ultimate motivational findings" in employment discrimination cases (See, e. g., Pullman-Standard v. Swint, 456 U.S. 273 (1982)). Blue Bell respectfully asserts, however, that there is need for the Court to establish a more definitive demarcation between a sufficiency of "rationally probative" evidence and an insufficiency of such evidence permitting "speculation over unfounded claims" (See, Lovelace v. Sherwin-Williams Co., supra, 681 F. 2d at 242).

With all respect, it is suggested that in the case at bar the jury's verdict has been given legally improper deference. Nevertheless, Blue Bell does contend that

the Court of Appeals for the Fourth Circuit has, in an earlier opinion, perceptively addressed the above-mentioned concerns and the need for proper "jury control" in cases such as Blue Bell's. Although Blue Bell submits that the Fourth Circuit, as quoted below, has articulated the proper standards for review of jury verdicts, Blue Bell also urges that in the present case such standards have been misapplied.

> "[The] emphasis, where causation is dispositive, upon 'probability,' 'reasonable probability,' 'substantial probability' rather than mere 'possibility' as the proper test simply bespeaks special danger that in a matter so generally incapable of certain proof jury decision will be on the basis of sheer speculation, ultimately tipped, in view of the impossibility of choosing rationally between mere 'possibilities,' by impermissible but understandable resort to such factors as sympathy and the like. It is of course precisely to guard against this danger that the burden of producing rationally probative evidence -- and the corresponding risk of nonproduction -- is placed upon claimants and subjected to the ultimate jury control devices of directed

verdict and judgment n.o.v. See, Brady v. Southern Railway Co., 320 U.S. 476, 480 . . . (1943) (to guard against 'the mischance of 'speculation' [illegible] unfounded claims'), Galloway . United States, 319 U.S. 372, 395 . . . (1942) (to insure that speculation be not allowed to do duty for probative facts'). The special danger in the causation context invites and justifies the special emphasis" [emphasis added].

* * *

"The ultimate motivational issue has now become whether, considering only age discrimination and the defendant's proffered reason as possible explanations, discrimination is the 'more likely' [citation omitted]. The plaintiff's new production burden has correspondingly become whether, as between only these two proffered reasons, the circumstantial evidence supports as a reasonable probability the inference that but for claimant's age he would not have been [discharged]" [emphasis added].

* * *

"The essential facts underlying defendant's articulated reason -- the critical record indicia of unchecked and steady decline in performance results for at least the final two years of claimant's tenure as store manager and his refusal, for whatever reason, during that critical period to admit or to take corrective action

specifically suggested by his employer -- were not essentially refuted despite the opportunity to do so by way of showing the reason based upon them to be pretextual. Claimant's evidence on this score consisted essentially of offering his own opinion that corrective action was not needed and of pointing to other favorable performance indicia, while not refuting the validity of the unfavorable indicia nor their manifestly greater significance in evaluating his most recent performance; to testifying that his employer's fault-finding only commenced in the late stages of his tenure as store manager [footnote omitted] rather than demonstrating that no fault existed; and to the expression of his own opinion that his performance continued to meet reasonable expectations.

"Taken all together -- whether offered directly to establish the 'qualification' predicate of the original presumption or to show defendant's proffered explanation of his demotion to be pretextual -- claimant's evidence did not suffice to allow a jury to infer that age discrimination was a determinative factor in this demotion. Though age discrimination is undoubtedly a possibility in any case of this kind, and though its easy concealment is a constant danger in attempts to vindicate this statutory right, a jury may nevertheless not be allowed to infer it from evidence that does no more than suggest it as a possibility.

* * *

". . . There is the further fact that the employer did in the latter stages of claimant's tenure begin increasingly to find specific fault with his performance, and to suggest specific corrective measures. From this claimant argues that the jury could and should be allowed to . . . infer a deliberate contrivance to set up claimant's demotion. Again, this is obviously a possibility, but the leap of inference required is simply too large to allow in logic and fairness. To accept it a jury would have to lay aside the unrefuted evidence that problems did exist and infer instead a deliberate scheme carried out carefully over a period of around two years, involving the extensive, venal efforts of several people and having as its final object only the demotion, not the outright discharge, of a single employee at the end of this extended plot. Such a leap of inference could only be by rank speculation and not by any rational processes of inference.

"When, as is proper, the unrefuted basic facts underlying the employer's proffered explanation of the demotion are taken into account in assessing the reasonableness of the necessary inference, we are satisfied that the district court properly granted judgment n.o.v."

Lovelace v. Sherwin-Williams Co., supra, 681 F. 2d at 242, 244, 245 and 246

Blue Bell will argue below that the above-quoted analysis should apply equally to the evidence in the case at bar.

B.

Blue Bell Was Entitled To a Directed Verdict or To Judgment Notwithstanding the Verdict

As mentioned above, it is incontrovertible that from 1977 through 1983, only two "over forty" Southeastern Region Boyswear salesmen -- Wilhelm and Kogut -- were discharged. During the same period, however, four other "under forty" salesmen also were discharged. Again, one of these "under forty" salesmen was discharged at exactly the same time and for exactly the same reasons as Kogut.

Blue Bell contends that its essentially unrebutted articulation of legitimate, non-discriminatory reasons for

discharging Kogut and Wilhelm precluded any legally permissible inference of intentional discrimination because of age, even if it could be concluded that the claimants somehow made out prima facie cases. Kogut and Wilhelm failed to prove by the requisite preponderance of evidence that they would not have been terminated "but for" the fact that they were "over forty". On the record in this case, which undeniably includes clearly articulated, non-discriminatory and legitimate business reasons for Blue Bell's actions,

> ". . . [A]ge simply exists . . . as one of any number of possible reasons -- including poor business judgment by the employer [citation omitted] -- for the [discharges]. On this basis to find age a determinative cause could only be by outright conjecture and not by any rational assessment of probabilities."
>
> Lovelace v. Sherwin-Williams Co., supra, 681 F. 2d at 243-244

Neither Kogut nor Wilhelm offered evidence that they were subjected to any kind of "disparate treatment". That is, there is absolutely no record evidence that any "under forty" salesman having an equal or worse performance record remained in Blue Bell's employ.

It is indisputable that, prior to their discharges, Blue Bell specifically informed both Kogut and Wilhelm of deficiencies it perceived in their performance of their jobs. There is absolutely no evidentiary indication that any salesman did remain or would have remained in Blue Bell's employ after he, like Kogut and thirty-six-year-old Randy Cloud, had been warned about but had persisted in substandard performance during an eight-week evaluation. Neither a jury nor the courts are permitted to adjudge the propriety, wisdom or fairness of Blue Bell's criteria, which cannot be said to

have been "aimed at" older salesmen (See Loeb v. Textron, Inc., 600 F. 2d 1003, 1012, n. 6 (1st Cir. 1979) and Moore v. Sears, Roebuck and Co., 683 F. 2d 1321, 1323 n. 4 (11th Cir. 1982)).

There also is absolutely no evidentiary indication that any other salesman did remain or would have remained in Blue Bell's employ after he, like Wilhelm, had been instructed to make twenty "line presentations" **per week** subsequent to a stated date but made one, two and four "line presentations" in the three weeks following the stated date. No other salesman remained in Blue Bell's employ although during the month following such specified date he had worked the fewest accounts of any salesman in the Region, although during that month his relative "salesman efficiency" had been the lowest in the Region, and although during that

month his total number of "accounts developed" had been the lowest in the Region.

Wilhelm offered evidence of his "**historical**" performance and "accolades", primarily resulting from sales volume that "historically" had been substantially self-generating. Wilhelm did not demonstrate that he earned anything except justly-deserved criticims, warnings, and probationary status during the last year of his employment.

Blue Bell freely acknowledged that Wilhelm in fact did much better **after** he was placed on probationary status, resulting in his being relieved from that status instead of then being discharged. As the record conclusively demonstrates, however, Wilhelm essentially quit working after his probation ended. He failed and refused to make the "line presentations" he specifically had been instructed to make; instead of making **sixty** line presentations in the first three

weeks of January, 1982, as he had been instructed to do, Wilhelm actually made a total of **seven** line presentations during those three weeks.

Wilhelm's only response was that, nevertheless, his naked sales volume figures were better than his figures for the previous year. The previous year's figures, however, had resulted in Wilhelm's being placed on probation. This so-called "improved" performance in January, 1982, resulted in the lowest relative "salesman efficiency" in the Region, the fewest "accounts developed" in the Region, and the lowest bookings in the Region. Wilhelm previously had been afforded the opportunity to alter his "modus operandi". There is no rational basis for a finding that he would have been given yet another chance "but for" his years.

As previously specified, Kogut and an "under forty" salesman were discharged for

failure to fulfill specified standards during an eight-week evaluation. Blue Bell's standards were specific and objective, and Kogut needed only to mechanically comply with them. It is legally immaterial and irrelevant whether the jury's or any other person's business judgment would have been advised to impose the same standards that Blue Bell imposed.

Kogut's failure to comply with Blue Bell's standards amounted to an insubordinate refusal to perform assigned tasks. This refusal, regardless of naked sales volume achieved, is a perfectly **lawful** reason for his discharge. Again, there is no evidentiary basis for a finding that Kogut's willful refusal to comply with Blue Bell's standards, after having been counselled, would have been excused "but for" his years. The same willful refusal on the part of Randy

Cloud, the thirty-six-year-old Boyswear salesman, undeniably was **not** excused.

The greater weight of the record evidence clearly suggests that neither Kogut nor Wilhelm would have been discharged "but for" their desultory performance of their sales jobs. Stated obversely, there decidedly is no preponderance of record evidence that they would have remained in Blue Bell's employ "but for" their years.

The Circuit Court concluded that there is, in this case, sufficient "direct" evidence of a general Blue Bell intention to discriminate **because of age**. **All** of the supposedly "direct" evidence is, at best, ambiguous and entirely circumstantial. There is absolutely no record indication that this supposed age-consciousness actually affected Kogut, Wilhelm or any other "over forty" salesman in any fashion. Blue Bell submits that there is no evidentiary

connection between the so-called "direct" evidence of an intention to discriminate and either Kogut's or Wilhelm's termination.

It is reemphasized that the several other "over forty" Boyswear salesmen were totally unaffected by any alleged age-consciousness attributed to Blue Bell's managers. Of the "over forty" salesmen, only Kogut and Wilhelm were discharged (along with an "under forty" salesman) because they resolutely refused to follow their managers' specific directions. It is legally irrelevant whether those specific directions made sense or seemed prudent to Kogut, Wilhelm or the jury. The jurors, however, must have been swayed by the **alleged** general statements reflecting age-consciousness, because they apparently ignored Blue Bell's unrebutted evidence showing undeniable cause for its discharge decisions.

The so-called "direct" evidence of a specific Blue Bell intent to discriminate includes a supervisor's alleged prediction to the effect that "Blue Bell is going to have $15,000 a year college boys for salesmen", who would be paid salaries and expenses instead of commissions and who would be "driving Chevrolets".

If such had been Blue Bell's intent, it undeniably did **not** need to fire "over forty" salesmen to accomplish the desired savings in salaries and benefits. It is indisputable that Blue Bell **could** have made a management decision to place its salesmen on a lower salary scale, pay their expenses, and furnish them Chevrolets. Such a management decision **could** have been made without having to overcome any legal obstacle whatever. The incumbent sales force, which had become accustomed to receiving commissions on high volume sales without really having

to "sell" the product, could either elect to accept the new compensation arrangements or seek other employment.

In these circumstances, it would be utter foolishness to seek to accomplish the same result by firing the incumbent sales force at a cost of defending age discrimination claims. The record decidedly does not reflect any such foolishness. Exactly to the contrary, there is no evidence that any salesman ever was put on a salary, either high or low, without commissions; there is no evidence that any salesman was placed on a low salary with expenses; and there is no evidence that any salesman was, against his will, confined to a Chevrolet. Indeed, the record discloses the exact opposite of any such actions. It is reiterated that **all** of the salesmen who remained in Kogut's division (after Kogut and the "under forty" salesman had been discharged) were "over

forty" and were compensated on the same basis as before.

Kogut and Wilhelm also emphasized their reliance upon alleged supervisory statements to the effect that "older people **tend** to become complacent whereas younger people **generally** have more drive and ambition" [emphasis added]. Any such statements relative to "tendencies" of older salesmen toward complacency or to the "drive and ambition" "**generally**" possessed by younger salesmen do not necessarily reflect any **controlling** bias or prejudice and undeniably also have reference to actual job performance -- "drive and ambition" in sales efforts are much to be preferred over "complacency". Again, the several other "over forty" Boyswear salesmen were absolutely unaffected by the alleged bias and prejudice supposedly reflected in any such statements; and it has not been shown that any "younger" salesman

benefited from the supposed bias and prejudice by receiving any preferential treatment. It is perfectly clear that Kogut's and Wilhelm's job performance did in fact exhibit both "complacency" and an absolute unwillingness to conform to specific management directives.

This unrebutted showing of "complacency-in-fact", and not any vague and ambiguous bias or prejudice, explains their discharges. Like the other "over forty" Boyswear salesmen, Kogut would have remained in Blue Bell's employ "but for" his failure, after specific counselling and warning, to fulfill the evaluation criteria imposed on **all** the salesmen in his division. Wilhelm would have remained in Blue Bell's employ "but for" his absolute refusal to make "line presentations" as instructed by his manager and "but for" the fact that he essentially quit working after his probation ended.

Blue Bell respectfully contends that, as in the Lovelace case, there definitely is in this case no preponderance of evidence that legitimate business reasons were only a "pretext" for the discharges in question. Because the evidence utterly fails to establish any kind of disparate treatment, it should be concluded that the jurors must have been swayed by such extraneous considerations as sympathy, "fairness", and the like in reaching their verdicts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 84-1854

Frank E. Wilhelm, Karl F. Gatlin and Harold L. Kogut,

Appellees,

versus

Blue Bell, Inc.,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, United States District Judge. (C/A 82-0507).

Argued: June 4, 1985 Decided: Sept. 18,1985

Before PHILLIPS, CHAPMAN and WILKINSON, Circuit Judges.

W.T. Cranfill, Jr. (John O. Pollard; Blakeney, Alexander & Machen on brief) for Appellant; Samuel M. Millette; Ernest S. DeLaney, III (DeLaney, Millette & McKnight, P.A. on brief) for Appellee.

CHAPMAN, Circuit Judge:

Plaintiffs Frank Wilhelm, Karl Gatlin, and Harold Kogut brought this age discrimination suit against their former employer, Blue Bell, Inc., under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621 et seq. Plaintiffs Wilhelm and Gatlin alleged that Blue Bell had discharged them because of their ages and that their respective discharges were without just cause and in violation of an implied covenant of good faith and fair dealing. Plaintiff Kogut later intervened and alleged that Blue Bell had discharged him because of his age. The plaintiffs' state law claims were dismissed prior to trial.

The jury found that Blue Bell had discharged plaintiffs Wilhelm and Kogut because of their ages in violation of the ADEA, awarded them damages, and concluded that

Blue Bell's discrimination was "willful" within the meaning of §7(b) of the ADEA, 29 U.S.C. §626(b). The jury also found that plaintiff Gatlin had not filed his age claim with the Equal Employment Opportunity Commission within the applicable time period and accordingly awarded him no damages. In conformity with the jury's verdict the district court awarded Wilhelm and Kogut back pay, liquidated damages equal to the back pay amounts, reinstatement, attorneys' fees and costs. These orders were stayed pending appeal.

Blue Bell appeals claiming that the district court erred in denying its motions for judgment notwithstanding the verdict or a new trial and in instructing the jury on the issue of willfulness. We affirm the district court's denial of Blue Bell's motion for judgment notwithstanding the verdict but remand the case for a new trial on the issue

of damages under a proper willfulness instruction.

I

Blue Bell manufactures and markets outer wearing apparel. Its most common product lines are blue jeans and related sportswear bearing the "Wrangler" brand name. Plaintiffs Wilhelm and Kogut were both Field Sales Representatives in the Southeastern Region of Blue Bell's Wrangler Boyswear Division. Wilhelm was responsible for the western half of North Carolina[1] and Kogut was responsible for the southern half of Florida.

Wilhelm was fired on February 2, 1982. Wilhelm was forty-nine years old and had been employed by Blue Bell for eight and one-half years when he was fired. At trial, Blue Bell claimed that it fired Wilhelm

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[1]Prior to mid-1981 Wilhelm was responsible for forty-one counties in North Carolina that ran from the Tennessee border to Wilmington.

because he refused to make "line presentations" as instructed by his supervisor, William Wise, and because he essentially ceased working in January 1982 after finishing a one year probationary period. Specifically, the evidence reveals that Wilhelm had worked only thirty accounts since January 1, the lowest of any salesman in the region. Blue Bell also notes that Wilhelm's relative salesman efficiency was the lowest in the region and his total number of accounts developed was the lowest in the region. In addition, Wilhelm's own contact reports indicate that he had made only one line presentation the first week in January, only two the second week, and only four the third week instead of the twenty per week required. As a result, Wilhelm had the lowest bookings in the region.

Wilhelm presents an entirely different picture of his performance. According to

Wilhelm, as of January 29, 1982, he had secured four new accounts, was twenty-four percent ahead of his prior year's sales, was number one in the Southeastern Region in sales, and was number eleven out of eighty-five sales persons in the nation. Furthermore, Wilhelm notes that these figures do not even take into account sales for the last week in January. Wilhelm states that had he received credit for all of the sales he made, his actual percentage ahead of sales for the year before would have been thirty-four percent and his position nationally would have been number nine out of eighty-five.

Kogut was fired on May 16, 1983. Kogut was fifty-two years old and had been employed by Blue Bell for twelve years when he was fired. At trial, Blue Bell claimed that it fired Kogut and an under forty salesman named Randy Cloud because they both failed, after

specific counseling and warning, to fulfill the evaluation criteria imposed on all the Boyswear salesmen in the Southeastern Region as part of an intensive eight-week period of evaluation. Blue Bell replaced Kogut with a twenty-eight year old salesman.

Kogut also presents a different picture of his performance. According to Kogut, at the time he was fired he was number one in the six-man district in accomplishing percent of sales quota and was number two in the entire Southeastern Region in acquiring new accounts. Kogut's immediate supervisor during the evaluation period, District Manager Joe C. Glover, testified that as of May 19, 1983, Kogut was at seventy-eight percent of quota with approximately four and one-half months laft in the fiscal year. In addition, Kogut notes that Blue Bell fired him approximately one month after he gave deposition testimony unfavorable to Blue

Bell as part of the discovery proceedings in the Gatlin and Wilhelm lawsuit.

II

To establish discrimination in an age discrimination case, the plaintiff must prove by a preponderance of the evidence that "but for" the defendant's motive to discriminate against an older employee, he would not have been terminated. E.E.O.C. v. Western Electric Co., Inc., 713 F.2d 1011, 1014 (4th Cir. 1983); Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239 (4th Cir. 1982); Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979). The plaintiff may meet this burden "under ordinary principles of proof by any direct or indirect evidence relevant to and sufficiently probative of the issue...." Lovelace, 681 F.2d at 239. Alternatively, the plaintiff may rely on the judicially created proof scheme for Title VII cases, see McDonnell Douglas Corp. v.

Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), which has been adopted for application in ADEA litigation. See E.E.O.C. v. Western Electric Co., Inc., 713 F.2d at 1014; Fink v. Western Electric Co., Inc., 708 F.2d 909 (4th Cir. 1983); Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980).

In this case it is undisputed that plaintiffs Wilhelm and Kogut were in the protected age bracket when Blue Bell fired them. Accordingly, the sole issue for trial was whether age was a determining factor in the discharge of each plaintiff. In Lovelace this court established that the dispositive motivational issue of whether the plaintiff was discharged because of his age can be proven without resort to the McDonnell Douglas format:

> Where -- as here, and ordinarily -- coverage and unfavorable action are not disputed, the dispositive and only issue is a difficult, but narrow, motivational one: whether the employee "was [discharged] because of his age." This may of course be proved under ordinary principles of proof by any direct or indirect evidence relevant to and sufficiently probative of the issue,...without resort to any special judicially created presumption or inferences related to the evidence.

681 F.2d at 239 (emphasis added)(quoting Loeb, 600 F.2d at 1017).

In Lovelace this court held that direct evidence of age discrimination is sufficient to overcome a motion for a directed verdict or judgment notwithstanding the verdict. There, this court stated that in ruling upon a sufficiency motion in an ADEA case:

> The first question is whether plaintiff's evidence may have carried the original production burden without need to invoke the McDonnell-Douglas presumption. This may have occurred, for example, through direct evidence of a stated purpose to disfavor because of age....If this is the judicial assessment, inquiry of course ceases, no further production burdens

> are put in play, and the motion can be denied.

681 F.2d at 240 (emphasis added)(citation omitted). Furthermore, in Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir. 1981), this court ruled that where the plaintiff in an ADEA case relies primarily upon direct evidence of a discriminatory motive by the employer, the case "'simply does not fit the mold of the McDonnell Douglas forumula,'" and the plaintiff has no need to prove independently that the defendant's articulated reasons for a discharge were "pretextual." Id. at 1113 & n.2 (quoting Loeb, 600 F.2d at 1018).

In considering the motion for judgment notwithstanding the verdict, the district court was required to view the evidence in the light most favorable to Wilhelm and Kogut and to draw all reasonable inferences in their favor. The district court could not weigh evidence or assess the credibility of

witnesses. 9 Wright & Miller, Federal Practice & Procedure §2524 at 543-45 (1971). The test for determining whether judgment notwithstanding the verdict should be entered is whether, viewing the evidence in the light most favorable to the appellee-plaintiff, there is substantial evidence in the record to support the jury's findings. Brady v. Allstate Insurance Co., 683 F.2d 86, 89 (4th Cir. 1982), cert. denied, 459 U.S. 1038 (1982); Miller's Mutual Insurance Association v. Southern Ry. Corp., 483 F.2d 1044 (4th Cir. 1973).

Unlike the motion for judgment notwithstanding the verdict, the district court may weigh evidence and assess credibility in ruling on a motion for a new trial. See Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891-2 (4th Cir. 1980). Indeed, the district court had a duty to order a new trial if "this action [was] required in order

to prevent injustice." 11 Wright & Miller, Federal Practice & Procedure §2805 at 38 (1973). However, the grant or denial of a motion for a new trial is within the sound discretion of the district court and will not be disturbed absent a clear showing of some abuse of discretion. See Abasiekong v. City of Shelby, 744 F.2d 1055, 1059 (4th Cir. 1984); United States v. Horton, 622 F.2d 144, 147 (5th Cir. 1980).

III

A

The first issue on appeal is whether the district court erred in denying Blue Bell's motions for judgment notwithstanding the verdict or a new trial. Blue Bell argues that the plaintiffs have failed to establish a prima facie case of age discrimination because the record conclusively shows that neither Wilhelm nor Kogut was subjected to any disparate treatment because of his age.

Blue Bell emphasizes that between 1977 and 1983 only two over-forty Boyswear salesmen in the Southeastern Region (plaintiffs Wilhelm and Kogut) were discharged. During the same period, however, four other under-forty salesmen were also discharged. Furthermore, Blue Bell maintains that it fired both Wilhelm and Kogut because they failed adequately to discharge their duties as measured by objective criteria. Blue Bell also argues that there is no substantial evidence to support the jury's findings that both Wilhelm and Kogut had successfully rebutted Blue Bell's legitimate, nondiscriminatory reasons for its employment decisions.

The plaintiffs introduced ample direct evidence suggesting that Blue Bell fired them because of their ages. This direct evidence of age discrimination consisted of testimony relating how various Blue Bell officials had indicated an intent to replace

older salesmen with younger salesmen. For example, plaintiffs introduced evidence of a conversation between Wilhelm and his immediate supervisor, William Wise, in February 1981, less than one year before Wilhelm's discharge, relating to various personnel changes in the company. Wilhelm testified that Wise told him that "eventually Blue Bell is going to have $15,000 a year college boys for salesmen....Blue Bell cannot stand these five and six percent commission rates; so, in time they will have all young college guys on a salary, being paid expenses and going around taking inventory in Blue Bell accounts." App. at 406.

The plaintiffs also introduced evidence of a conversation between Wilhelm and Wise in September 1981 when Wise placed Wilhelm on probation. At that time Wilhelm protested that his performance was better than the other salesmen in the Region and accused

Blue Bell of being "on a youth campaign" and wanting "to get rid of the older guys and replace them with younger people." App. at 423. Instead of denying that accusation, Wise confirmed that he believed that "older people tend to become complacent whereas younger people generally have more drive and ambition." Id. Wilhelm testified that Wise told him that "He was going to take care of him first and then there were going to be some others." Id.

Kogut testified that in September or October 1981 Wise conceded that he believed that "younger salesmen do a much better job than older salesmen." App. at 580. According to Kogut, Wise further stated that "in the not too distant future, all Wrangler salesmen would be young, college boys driving leased Chevrolets, taking inventory on big Wrangler accounts." Id. Kogut testified to these statements by Wise while he was a

Blue Bell employee and prior to becoming a plaintiff in this case.

Wilhelm and Kogut testified that they informed Jerry Poole, the president of the Boyswear Division of Blue Bell, about the statements made by Wise that younger salesmen do a much better job than older salesmen and that the future Blue Bell salesman would be a young college boy. According to Wilhelm and Kogut, in each instance Poole responded, "That really doesn't bother me too much." App. at 440, 776. At trial Poole admitted that Wilhelm and Kogut had informed him of Wise's age related remarks prior to their termination and that he had, in fact, responded to each that the statements did not bother him. App. at 776. Poole explained that these threats to terminate older salesmen and replace them with "college boys" did not bother him because he was not "going to let it happen." Id. Furthermore, the

uncontradicted evidence at trial established that when Poole was first informed that Wise had placed Wilhelm on probation in September 1981, five months prior to his firing, Poole responded, "you have to understand that Bill Wise is of the opinion that the younger salesmen do a much better job than you older fellows. You older fellows have a tendency to become complacent after you have been around a while and run out of steam." App. at 579.

Wise ceased to be Kogut's manager and was replaced by Joe Glover. The plaintiffs offered evidence that in December 1981 Glover told Kogut, Wilhelm and another Blue Bell salesman that "Blue Bell doesn't want salesmen with good records anymore....They want young men who can do the work for a lot less money." App. at 445-46, 597-98. The plaintiffs further offered evidence that in December 1981, one month prior to Wilhelm's

firing, the National Sales Manager of Blue Bell, Ed Weymeth, approached Wilhelm, Kogut, and one other older salesman and said, "My God, [are] you old guys still around. I thought we got rid of you at the last sales meeting." App. at 596, 445.

We conclude that there is substantial evidence in the record to support the jury's findings that Blue Bell discharged Wilhelm and Kogut because of their ages. The plaintiffs introduced ample direct evidence of age discrimination from which the jury could have concluded that Blue Bell fired Wilhelm and Kogut because of their ages. This direct evidence of age discrimination, if believed by the jury, was sufficient by itself to support a verdict for the plaintiffs and, concomitantly, to survive a motion for a directed verdict or a judgment notwithstanding the verdict. Lovelace v. Sherwin-Williams Co., 681 F.2d at 240. In addition,

this direct evidence of age discrimination obviated the need for an independent showing by plaintiffs that Blue Bell's articulated reasons for their discharges were "pretextual." Spagnuolo v. Whirlpool Corp., 641 F.2d at 1113. Thus, the district court did not err in denying Blue Bell's motion for judgment notwithstanding the verdict. For the same reasons, the district court did not abuse its discretion in denying Blue Bell's motion for a new trial.

B

The second issue is whether the district court erred in instructing the jury on the issue of willfulness. Section 7(b) of the ADEA, 29 U.S.C. §626(b), provides that a prevailing plaintiff is entitled to double damages in the case of a "willful" violation of the ADEA. In this case the district court awarded the plaintiffs liquidated damages "based upon the jury verdict, and all the

evidence before the court" and because the "discriminatory actions of defendant towards [Wilhelm and Kogut] were willful and not effected in good faith."

Despite its failure to object at trial, Blue Bell argues that the district court erred in instructing the jury on the issue of willfulness. It claims that the instruction was inconsistent with the Supreme Court's recent decision in TransWorld Airways, Inc. v. Thurston, ___ U.S. ___, 105 S.Ct. 613 (1985), decided during the pendency of this appeal. We analyze the instruction in light of TransWorld. See United States v. The Schooner Peggy, 5 U.S. 1 (1 Cranch) 102 (1801); Bradley v. School Board of the City of Richmond, 416 U.S. 696, 711-12 (1974).

In TransWorld the Supreme Court approved the Second Circuit's definition that a violation is willful if "'the employer either

knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" 105 S.Ct. at 625 (quoting the Second Circuit below, 713 F.2d 940, 956 (2d Cir. 1983). This holding prevents an award of liquidated damages when a diligent employer, fully aware of the ADEA and pursuing a mistaken path to comply with it, acts reasonably and in good faith. 105 S.Ct. at 625 n.22, 626. The Supreme Court expressly rejected the argument that a violation of the ADEA is willful if the employer simply knew of the potential applicability of the Act:

> Even if the "in the picture" standard were appropriate for the statute of limitations, the same standard should not govern a provision dealing with liquidated damages. More importantly, the broad standard proposed by the respondents would result in an award of double damages in almost every case. As it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure

> of the statute show that Congress intended a two-tiered liability scheme.

Id. at 625 (footnote omitted).

In this case the district court initially instructed the jury as follows:

> If you find that the discharge of one of the plaintiffs was knowingly and intentionally done, with the knowledge that the transaction was subject to the Age Discrimination Act and that...it was intentionally done knowing what the consequences would be and that conduct was in violation of the law to the knowledge of the actor, then you would answer that issue yes. Otherwise, you would answer it no.

After its initial instructions, the district court gave counsel for both sides an opportunity outside the presence of the jury to object to the instructions or to propose additional instructions. Plaintiffs' counsel objected to the court's instruction that Blue Bell must have intentionally violated the law in order for its conduct to have been willful and proposed an additional instruction on that issue. The district court

then gave an additional two sentence instruction on the issue of willfulness:

> Conduct is willful when it is done intentionally, knowingly, with the intention to accomplish the result of firing and with awareness on the part of the actor that the conduct is covered by the Age Law. It doesn't quite go so far as to require that there be proof of an intentional act to violate the law but there does have to be a consciousness of the application of the law in order for it to be willful. (emphasis added).

The district court's second willfulness instruction is similar to the "in the picture" standard rejected in TransWorld. As the Supreme Court noted in TransWorld, this type of standard would result in an award of double damages in nearly every case. Thus, we reverse the district court's award of liquidated damages and remand the case for a new trial on the issue of damages under a willfulness instruction consistent with the Supreme Court's decision in TransWorld.

C

The third issue concerns various evidentiary rulings. Blue Bell contends the district court committed four separate evidentiary errors in (1) refusing to allow counsel for Blue Bell to cross-examine Kogut about whether there was a territory that encompassed the northern half of Florida, the southern part of Georgia, and the part of South Carolina including Charleston; (2) refusing to allow Blue Bell to introduce into evidence during the testimony of Joe Glover part of a chart which contained summaries of information from other Blue Bell records concerning the performance of salesmen in both the northern and southern districts; (3) admitting into evidence a letter written by William Holt, the president of Blue Bell's Maverick Division, to all retail distributors of Blue Bell's products; and (4) refusing to allow Blue Bell to introduce testimony and exhibits concerning the sales

performance of Wilhelm's twenty-four year old replacement, Wayne Knighton.

The admission or exclusion of evidence rests within the sound discretion of the district court and cannot be reversed absent abuse of that discretion. DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 518 (4th Cir. 1985); Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192 (4th Cir. 1982). After carefully reviewing the record we are unable to conclude that the district court abused its discretion in this case.

IV

In summary, we affirm the district court's denial of Blue Bell's motion for judgment notwithstanding the verdict but remand the case for a new trial on the issue of damages under a proper willfulness instruction. On remand, the district court should instruct the jury on willfulness in conformity with the Supreme Court's recent

decision in TransWorld Airways, Inc. v. Thurston, ___ U.S. ___, 105 S.Ct. 613 (1985).

REMANDED.

DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-507-M

FRANK WILHELM, KARL F. GATLIN and HAROLD L. KOGUT,	)	
Plaintiffs,	)	
v.	)	ORDER
BLUE BELL, INC.,	)	
Defendant.	)	

Defendant on September 5, 1984, filed a motion for stay of judgment pending appeal from this court's orders of July 3, 1984. Plaintiffs' counsel has not opposed this motion.

The motion for a stay is GRANTED.

IT IS SO ORDERED, this the 11 day of October, 1984.

s/
James B. McMillan
United States District Judge

DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-507-M

FRANK WILHELM, KARL F. GATLIN and HAROLD L. KOGUT, Plaintiffs,	)	
v.	)	FINAL JUDGMENT
BLUE BELL, INC., Defendant.	)	

This case was tried before a jury beginning on February 27, 1984, and on March 5, 1984, the jury returned verdicts as follows:

As to the plaintiff Frank E. Wilhelm:

1. Did defendant discharge plaintiff because of his age, in violation of the Age Discrimination in Employment Act?

ANSWER: Yes.

2. If so, what amount is plaintiff entitled to recover for loss of earnings up to the present?

ANSWER: $108,300

3. If so, was defendant's discharge of the plaintiff in violation of the age law wilful?

ANSWER: Yes.

As to the plaintiff Karl F. Gatlin:

1. Did defendant Blue Bell fail to post and keep posted in conspicuous places on its premises notices approved by the Secretary of Labor advising employees of their rights under the Age Discrimination in Employment Act?

ANSWER: No.

2. Did the plaintiff file a charge of age discrimination within 180 days of the time he retained a lawyer or obtained actual knowledge of his rights under the Age Discrimination in Employment Act?

ANSWER: No

3. Did defendant discharge plaintiff because of his age in violation of the Age Discrimination in Employment Act?

ANSWER: Yes

4. If so, what amount is plaintiff entitled to recover for loss of earnings up to the present?

ANSWER: $ 0

5. If so , was defendant's discharge of the plaintiff in violation of the age law wilful?

ANSWER: Yes.

As to the plaintiff Harold L. Kogut:

1. Did defendant discharge plaintiff because of his age, in violation of the Age Discrimination in Employment Act?

ANSWER: Yes

2. Did defendant discharge plaintiff because plaintiff gave a deposition in the age discrimination suits of Wilhelm and Gatlin?

ANSWER: Yes

3. If so, what amount is plaintiff entitled to recover for loss of earnings up to the present?

ANSWER: $55,660

4. If so, was defendant's discharge of the plaintiff in violation of the age law wilful?

ANSWER: Yes.

Claims for equitable relief were tried to the court simultaneously. With this judgment the court is entering an order granting equitable relief and an order allowing attorneys' fees.

On the basis of the foregoing, IT IS ORDERED, ADJUDGED, AND DECREED:

1. That plaintiff Gatlin shall have and recover nothing of defendant.

2. That plaintiff Frank E. Wilhelm shall have and recover of defendant the sum of $108,300.00 for the loss of earnings up to the time of the verdict of the jury.

3. That plaintiff Wilhelm shall have and recover of defendant an additional amount of $108,300 as liquidated damages.

4. That defendant shall reinstate plaintiff Wilhelm as a salesman in the Boys Wear Division of the southeast region, having the same western North Carolina territory that he had at the time of his discharge, or to a position in the same location and of stature, compensation, future prospects, and responsibility equal to the position he had at the time he was unlawfully discharged.

5. That defendant shall provide plaintiff Wilhelm with all the rights and benefits, including pension and profit sharing

benefits, life insurance, medical insurance, travel and accident insurance, and disability income insurance which would have accrued to plaintiff if he had not been illegally discharged by defendant.

6. That from the date of the verdict of the jury until such time as plaintiff Wilhelm is reinstated, defendant shall pay plaintiff the same salary, benefits and emoluments, including increases ansd bonuses, as have been or are being and will be paid to other sales representatives in the Wrangler Boys Wear Division of the southeast region with no less seniority than plaintiff, less such amounts as plaintiff earns, or is able to earn with reasonable diligence, during that period.

7. That plaintiff Harold Kogut shall have and recover of defendant the sum of $55,660.00 for the loss of earnings up to the time of the verdict of the jury.

8. That plaintiff Kogut shall have and recover of defendant an additional amount of $55,660.00 as liquidated damages.

9. That defendant shall reinstate plaintiff Kogut as a salesman in the Boys Wear Division of the southeast region, having the same southern Florida territory that he had at the time of his discharge, or to a position in the same location and of stature, compensation, future prospects, and responsibility equal to the position he had at the time of his discharge.

10. That defendant shall provide plaintiff Kogut with all the rights and benefits, including pension and profit sharing benefits, life insurance, medical insurance, travel and accident insurance, and disability income insurance which would have accrued to plaintiff if he had not been illegally discharged by defendant.

11. That from the date of the verdict of the jury until such time as plaintiff Kogut is reinstated, defendant shall pay plaintiff the same salary, benefits and emoluments, including increases and bonuses, as have been or are being and will be paid to other sales representatives in the Wrangler Boys Wear Division of the southeast region with no less seniority than plaintiff, less such amounts as plaintiff earns, or is able to earn with reasonable diligence, during that period.

12. That plaintiffs Wilhelm and Kogut shall recover attorneys' fees of $116,624.25 to be paid to the firm of DeLaney, Millette, DeArmon and McKnight.

13. That plaintiffs Wilhelm and Kogut shall recover the costs and expenses of this action, including the expenses incurred by the law firm of DeLaney, Millette, DeArmon and McKnight, in the sum of $5,388.10.

14. That interest shall be paid on all sums now payable, at the maximum rate allowed under North Carolina law, from the date of entry of the jury's verdict.

This 3 day of July, 1984.

s/ _____
James B. McMillan
United States District
Judge

DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-507-M

FRANK WILHELM, KARL F. GATLIN and HAROLD L. KOGUT,	)	
Plaintiffs,	)	ORDER GRANTING EQUITABLE RELIEF
v.	)	
BLUE BELL, INC.,	)	
Defendant.	)	

This case was tried before a jury, which on March 5, 1984, returned a verdict in favor of plaintiffs Frank E. Wilhelm and Harold L. Kogut. Plaintiffs also seek equitable relief, including reinstatement to the positions they held before the actions of defendant which culminated in their illegal discharge. Specifically, plaintiff Wilhelm seeks reinstatement to his former position as a salesman in the Boys Wear Division of defendant's southeast region; plaintiff Kogut also seeks reinstatement to his former

position as a salesman in the Boys Wear Division of defendant's southeast region.

Based upon the jury verdict, and all the evidence before the court, I find the following:

1. That age was the principal and determining factor in defendant's decision to discharge plaintiff Wilhelm from his position as a salesman with the Wrangler Boys Wear Division of defendant's southeast region on February 2, 1982, and that the discriminatory acts of defendant toward plaintiff Wilhelm were wilful, and not effected in good faith.

2. That plaintiff Wilhelm is entitled to an order granting him reinstatement to his former position with defendant.

3. That age, and retaliation for plaintiff Kogut having testified at a deposition in this case brought under the Age Discrimination in Employment Act (ADEA) were the

principal and determining factors in defendant's decision to discharge plaintiff Kogut from his position as a salesman with the Wrangler Boys Wear Division of defendant's southeast region on May 16, 1983, and that the discriminatory actions of defendant toward plaintiff Kogut were wilful, and not effected in good faith.

4. That plaintiff Kogut is entitled to an order granting him reinstatement to his former position with defendant.

Accordingly, the prayers for equitable relief are allowed as follows:

1. Defendant is enjoined to reinstate plaintiff Frank E. Wilhelm as a salesman in the Boys Wear Division of the southeast region, having the same western North Carolina territory that he had at the time of his discharge, or to a position in the same location and of stature, compensation, future prospects, and responsibility equal to

the position he had at the time he was unlawfully discharged.

2. Defendant is further enjoined to provide plaintiff Wilhelm with all the rights and benefits, including pension and profit sharing benefits, life insurance, medical insurance, travel and accident insurance, and disability income insurance which would have accrued to plaintiff if he had not been illegally discharged by defendant.

3. From the date of the verdict of the jury until such time as plaintiff Wilhelm is reinstated, defendant shall pay plaintiff the same salary, benefits and emoluments, including increases and bonuses, as have been or are being and will be paid to other sales representatives in the Wrangler Boys Wear Division of the southeast region with no less seniority than plaintiff, less such amounts as plaintiff earns, or is able to

earn with reasonable di`igence, during that period.

4. Defendant shall pay $108,300.00 to plaintiff Wilhelm as liquidated damages for wilful violation of the Age Discrimination in Employment Act.

5. Defendant is enjoined to reinstate plaintiff Harold Kogut as a salesman in the Boys Wear Division of the southeast region, having the same southern Florida territory that he had at the time of his discharge, or to a position in the same location and of stature, compensation, future prospects, and responsibility equal to the position he had at the time of his discharge.

6. Defendant is further enjoined to provide plaintiff Kogut with all the rights and benefits, including pension and profit sharing benefits, life insurance, medical insurance, travel and accident insurance, and disability income insurance which would

have accrued to plaintiff if he had not been illegally discharged by defendant.

7. From the date of the verdict of the jury until such time as plaintiff Kogut is reinstated, defendant shall pay plaintiff the same salary, benefits and emoluments, including increases and bonuses, as have been or are being and will be paid to other sales representatives in the Wrangler Boys Wear Division of the southeast region with no less seniority than plaintiff, less such amounts as plaintiff earns, or is able to earn with reasonable diligence, during that period.

8. Defendant shall pay $55,660.00 to plaintiff Kogut as liquidated damages for wilful violation of the ADEA.

These decisions shall be incorporated into the judgment.

IT IS SO ORDERED, this 3 day of July, 1984.

s/ _____
James B. McMillan
United States District
Judge

DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-507-M

FRANK WILHELM, KARL F. GATLIN and HAROLD L. KOGUT, Plaintiffs,	)	
v.	)	ORDER AWARDING ATTORNEYS' FEES
BLUE BELL, INC., Defendant.	)	

On this date, the court entered a final judgment on the jury's verdict in favor of plaintiffs Wilhelm and Kogut, and in favor of defendant with respect to the claim of plaintiff Gatlin, in this action brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 et seq. Attorneys for the plaintiffs have filed a petition for an award of attorneys' fees and costs pursuant to 29 U.S.C. §626(b) and ¶§216(b). As prevailing parties, plaintiffs Wilhelm and Kogut are entitled under these sections of the statute to a reasonable attorneys' fee.

In calculating a "reasonable attorneys' fee" the court is guided by the Supreme Court's recent decision in Blum v. Stenson, ___ U.S. ___, 52 U.S.L.W. 4337 (March 21, 1984). Pursuant to the guidelines set forth in that opinion, the court must make an initial estimate of a reasonable fee by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. A reasonable hourly rate is generally deemed to be the prevailing market rate for the services rendered; the burden is on the fee applicant to produce evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. ___ U.S. ___, 52 U.S.L.W. at 4379, n.11.

The court, in its discretion, may consider a number of factors in determining a reasonable hourly rate, including the

experience and special skills of the attorney, the quality of representation, the novelty and complexity of issues, and the results obtained in the action. ___ U.S. ___, 52 U.S.L.W. at 4380. This court will also consider the factors set forth in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), as adopted by the Fourth Circuit in Barber v. Kimbrell's Inc., 577 F.2d 216 (4th Cir.), cert. den., 439 U.S. 934 (1978), and Anderson v. Morris, 658 F.2d 246 (4th Cir. 1981). See also, Hensley v. Eckerhart, ___ U.S. ___, 51 U.S.L.W. 4552 (May 16, 1983).

Counsel for the plaintiffs have submitted affidavits showing that Mr. Samuel M. Millette spent 905.8 hours working on this case; Mr. Ernest S. DeLaney, III, spent 329.3 hours working on this case; and Mr. Timothy G. Sellers spent 9.8 hours working on this case. Mr. Millette and Mr. DeLaney have each

claimed an hourly rate of $125.00; Mr. Sellers has claimed an hourly rate of $85.00.

In determining the reasonableness of the hours claimed and the requested rates, the court has considered the following:

1. The special skill, experience and reputation of counsel. -- Mr. Millette has practiced law in North Carolina since 1951, and is widely experienced in all levels of trial and appellate litigation. Mr. Millette may well have had more experience in the prosecution of age discrimination case than any other attorney in the State of North Carolina. Mr. Millette enjoys an excellent reputation as a highly skilled attorney.

Mr. DeLaney has been a member of the North Carolina bar for over eleven years. During that time he has had extensive experience in federal litigation of employment discrimination suits, particularly actions

brought under the ADEA. His reputation in the community is also excellent.

2. The quality of representation. -- Plaintiffs' counsel rendered a high quality of service to their clients. Counsel vigorously and successfully pursued contested matters of pretrial discovery, and compiled and organized a substantial factual record by the time of trial. The five-day trial was smooth and uninterrupted by delay, and plaintiffs' evidence was presented in an exceptionally clear and concise manner.

3. The results obtained. -- Counsel acheived excellent results for both plaintiffs Wilhelm and Kogut. The jury found that both of these plaintiffs had been discriminated against in violation of the law, and it awarded damages fully commensurate with those findings. Plaintiffs will receive not only the monetary compensation for the detriment they have suffered, but they

will also ultimately be returned to their rightful places.

Despite counsel's best efforts, plaintiff Gatlin did not prevail on his claim. Nevertheless, plaintiff Gatlin's presence in this lawsuit was significantly beneficial to the claims of plaintiffs Wilhelm and Kogut; his testimony provided valuable evidence to support the jury's finding that defendant had discriminated against Wilhelm and Kogut in violation of the ADEA.

4. The novelty and complexity of the issues. -- This case did not involve novel issues of law; however, it involved complex and hotly contested factual issued that were hard fought at every stage. Plaintiffs' counsel were required to organize an extensive and complicated factual record, based on both circumstantial and direct evidence; they did so in a manner that rendered the

case readily comprehensible to both judge and jury.

5. The preclusion of other employment by the attorneys because they handled this case. -- This factor is not significant in determining a reasonable fee in this case.

6. Time limitations imposed by the client or the circumstances. -- This factor is not significant in determining a reasonable fee in this case.

7. The undesirability of the case within the legal community. -- This factor is not significant in determing a reasonable fee in this case.

8. The nature and length of the professional relationship. -- This factor is not significant in determing a reasonable fee in this case.

9. Time and labor expended. -- Plaintiffs' counsel, among them, devoted 1,244.9 hours to this case. The court finds that

the time and labor expended by counsel was reasonable and fully commensurate with both the seriousness of the case and the level of their ability.

Plaintiff Gatlin did not prevail on his claim and, therefore, most of the hours expended on his behalf will not be included in the award. The court will not reduce the number of compensable hours by one-third, however, because the time spent by counsel preparing plaintiff Gatlin's case was necessarily beneficial to plaintiffs Wilhelm and Kogut, in that there was a substantial overlap of facts relevant to all three cases. Therefore, the court will reduce the compensable hours claimed by plaintiffs' counsel by twenty-five percent. The resulting compensable hours are as follows:

Mr. Millette: 905.8 hours minus 226.45 (25% x 905.8) = 679.35 hours.

Mr. DeLaney: 3239.3 hours minus 82.325 (25% x 329.3) = 246.98 hours

10. Customary fee for like work. -- The court has considered the affidavits of counsel, the supporting affidavits submitted by reputable and experienced attorneys in the community, and all of the foregoing factors, and finds that a reasonable hourly rate for Mr. Millette is $125.00 and for Mr. DeLaney is $125.00, and for Mr. Timothy G. Sellers is $85.00.

Accordingly, the court has calculated its initial estimate of a reasonable fee in the following manner:

Mr. Samuel M. Millette 679.35 hours x $125.00 per hour =	$ 84,918.75
Mr. Ernest S. DeLaney, III 246.98 hours x. $125.00 per hour =	30,872.50
Mr. Timothy G. Sellers 9.8 hours x $85.00 per hour =	833.00
Total:	$116,624.25

In addition to fees, plaintiffs are entitled to recover costs and expenses related to the litigation. Plaintiffs' counsel have submitted affidavits setting forth the following expenses paid or incurred during the course of the action:

1. Filing fees, other cost of court and witness fees	$ 488.10
2. Expenses of depositions	5,591.91
3. Federal Express and express mail expenses	59.85
4. Preparation of poster exhibits and payment to Blakeney, Alexander & Machen for copying expense of personnel files	265.95
5. Xerox and other copying expenses	237.38
6. Telephone expense	540.95
Total:	$7,184.14

These costs and expenses are entirely reasonable and are fully compensable under

the ADEA. Cf. Wheeler v. Durham City Board of Education, 585 F.2d 618, 623-24 (4th Cir. 1978); however, consistent with the fee award, the court will reduce the amount awarded to cover expenses by twenty-five percent, or $1,796.04.

Subtracting $1,796.04 from $7,184.14, the court finds that plaintiffs are entitled to receive from defendant $5,388.10 as reasonable costs and expenses of litigation.

IT IS THEREFORE ORDERED that defendant pay to counsel for plaintiffs the following sums:

Attorneys' fees	$116,624.25
Costs and expenses	5,388.10
Total:	$122,012.35

This 3 day of July, 1984.

s/
James B. McMillan
United States District Judge

DISTRICT COURT OF THE UNITED STATES
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-507-M

FRANK WILHELM, KARL F. GATLIN and HAROLD L. KOGUT,	)	
Plaintiffs,	)	
	)	ORDER
v.	)	
BLUE BELL, INC.,	)	
Defendant.	)	

This case was heard today on the various motions. It is ORDERED as follows:

1. The motion of the defendant for judgment notwithstanding the verdict as to the plaintiff Wilhelm is denied.

2. The motion of the defendant for judgment notwithstanding the verdict with respect to the plaintiff Kogut is denied.

3. Plaintiff Gatlin's motion for a judgment notwithstanding the verdict in favor of the defendant is denied.

4. Ruling is deferred on the question of attorneys' fees. Counsel for all parties

are directed to examine the recent decision of the Supreme Court, Blum versus Stinson, and consider the rearrangement of thought required by that decision in the matter of assessing attorneys fees and also to consider the sufficiency of proof which at present lacks affidavits from lawyers regarding the question of reasonableness of fees. Affidavits from both sides will be received if offered.

In further comment on the verdict:

All the verdicts are supported by adequate evidence.

The evidence in favor of plaintiffs Wilhelm and Kogut was, in my opinion, especially strong and it fully meets all of the most stringent requirements of Burdine and McDonnell-Douglas and similar cases with regard to the shifting of the burden of production of evidence and the sufficiency of the plaintiffs' case.

In their research on the question of fees, counsel are requested to advise the Court, specifically with reference to Fourth Circuit and United States Supreme Court decisions, whether they have any doubt that the Court can enter a judgment regarding fees after an appeal has been taken from a judgment on the verdict. The Court agrees that judgment on all the verdicts should be entered but does not want to proceed with that action until receipt of advice by counsel.

As soon as memoranda have been received from both sides, final action will be taken on all the matters left in suspense by this order.

The Court would like to receive from counsel anything else they wish to write not later than May 14.

This 30th day of April, 1984.

s/
James B. McMillan
United States District Judge

Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 85-1073

in the Supreme Court of the United States

October Term, 1985

BLUE BELL, INC.,
Petitioner

vs.

FRANK E. WILHELM and HAROLD L. KOGUT,
Respondents

Brief In Opposition To Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

Samuel M. Millette
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DeLaney, Millette & McKnight, P.A.
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STATEMENT OF THE CASE

Plaintiffs, Frank Wilhelm and Karl Gatlin, commenced a civil action against the petitioner, Blue Bell, on September 3, 1982, alleging that each had been discharged by Blue Bell because of his age in violation of the Age Discrimination in Employment Act. 29 U.S.C. §621 *et. seq.* (the "ADEA"). At that time, Wilhelm was forty-nine years old and Gatlin was sixty-one years old. On April 11, 1983, the deposition of Harold Kogut, then a salesman for Blue Bell, was taken in Jacksonville, Florida. One month after giving his testimony, Kogut was fired by Blue Bell. Kogut intervened as a plaintiff in this case, alleging that he was discharged because of his age and in retaliation for his deposition testimony in violation of the ADEA. At the time Kogut petitioned the court to intervene, he was fifty-two years old and had been employed by Blue Bell for twelve years.

The case was tried before a jury, which on March 5, 1984, returned a verdict in favor of plaintiffs Wilhelm and Kogut, and against plaintiff Gatlin. Based upon the jury verdict the district court entered a judgment dismissing the claim of Gatlin and awarding relief to Wilhelm and Kogut.

During his first full year of employment, Wilhelm was the number one salesman in the nation for Blue Bell. Although he was assigned to one of the smallest territories in the nation by Blue Bell, Wilhelm consistently produced the largest sales volume of any salesman in the country. In 1978, Wilhelm achieved one hundred sixty-three percent of his quota and was selected by Blue Bell as the number one salesman in the country.

Blue Bell annually selected its ten best salesman in the nation and honored them by inducting them into an elite organization known as the "Top Ten Club". Wilhelm was selected for membership in the Top Ten Club by Blue Bell seven out of the almost nine years that he worked for the company. During his nine year tenure with Blue Bell, Wilhelm received one performance appraisal from the company and on that occasion, in July of 1979, his performance was rated as excellent. Wilhelm ranked number one in per capita sales for the Southeast Region eight out of the nine years that he was employed by Blue Bell.

In February of 1981, Bill Wise, the Regional Manager of the Southeast and Wilhelm's immediate superior, came to Asheville, North Carolina to go with Wilhelm to one of the biggest accounts in his territory, Sky City. On that occasion, Wilhelm questioned Wise as to personnel changes within the company and asked him what they meant. Wise replied "Well, Frank, eventually Blue Bell is going to have $15,000.00 a year college boys for salesmen. Blue Bell cannot stand these five and six percent commission rates, so in time they will have all young college guys on a salary being paid expenses and going around taking inventory in Blue Bell accounts." Just four months earlier, the second and third largest accounts in Wilhelm's territory had been taken from him and given to a salaried, non-commissioned account executive who was thirty-three years old.

In June of 1981, Wise asked Wilhelm to come to Atlanta to meet with him. At that conference Wise told Wilhelm that he was going to reduce Wilhelm's projected commission earnings by about $10,000.00 per year. When

Wilhelm inquired as to the reason for doing it, Wise replied, "Well, Frank, if you were to leave Blue Bell for any reason, I already know who your replacement would be. We would start him out at considerably less than the figure that we are talking about." Wilhelm then said, "Well, I guess the guy would probably be twenty years younger than I am too." Wise replied, "That's right."

In September of 1981, Wise told Wilhelm that he was placing him on probation. Wilhelm stated to Wise, "You know and I know what this is all about and the guys downstairs know what this is all about. Blue Bell is on a youth campaign. You want to get rid of the older guys and replace them with younger people." To that Wise replied, "Well, I personally am of the belief that older people tend to become complacent whereas younger people generally have more drive and ambition." Wise told Wilhelm "that he was going to take care of him first and then there were going to be some others", and specifically referred to a forty-two year old salesman named Ron Strickland, who subsequently was terminated by Blue Bell. Wise then assigned Wilhelm certain goals to be accomplished by December 4, 1981 or he would be fired. On December 4, 1981, Wise wrote to Wilhelm, acknowledging that Wilhelm had met the goals and praising him in glowing terms for his efforts and accomplishments.

In the last week of January 1982, Wise contacted Wilhelm and told him that he wanted to travel with him on the 2nd, 3rd and 4th of February. Wise inquired as to how sales were going and Wilhelm told him things had broken loose after the bad weather and he was

having an excellent week and had opened three new accounts. Wise said, "Great, I will see you next week." When Wilhelm met Wise on February 2, 1982, Wise said, "I have decided to let you go. You don't know how to do this job." At that time, Wilhelm was twenty-four percent ahead of his prior year sales and was the top salesman in the Southeast Region.

Wilhelm was replaced by Wayne Knighton, a twenty-four year old who had been hired by Blue Bell shortly before Wilhelm was placed on probation in September, 1981. As of January 29, 1982, Wilhelm had secured four new accounts (more than double the company standard), was twenty-four percent ahead of his prior year sales, was number one in the region in sales and was number eleven in the nation in sales out of eighty-five sales people. Such figures did not even take into account his sales for the last week in January. Had Wilhelm received credit for all of the sales he made, his actual percentage ahead of sales for the year before would have been thirty-four percent and his position nationally would have been number nine. Wilhelm actually opened twenty-nine new accounts, nine more than the company standard, in the year immediately preceding his termination.

At a sales meeting in Atlanta on December 30 and 31, 1981, Mr. Weymouth, the National Sales Manager, passed by several of the older salesmen and stated, "Are you old SOBs still with us? I thought we got rid of you at the last sales meeting." At the same meeting, Joe Glover, the regional sales manager who fired plaintiff Kogut, told Wilhelm that if he were his sales manager, "you are just the one I would get rid of. You have made too much money. I would replace you with some young guy that I didn't have to pay anything."

The jury determined that plaintiff Karl Gatlin did not file his charge of age discrimination with the Equal Employment Opportunity Commission within the time provided by the law, and accordingly, returned a verdict against him. Gatlin, though, was an important witness in the trial as to specific instances of age discrimination by the defendant.

When Gatlin was fired in 1981, he was told by his regional manager that his termination was due to poor performance. However, at the time of such firing, his sales were approximately thirty-seven percent above his sales for the previous year and he was second in the region in terms of attainment of quota. Gatlin had reached his sales quota in each of the years 1978, 1979 and 1980. These quota figures were particularly significant in view of the fact that when Gatlin first started with Blue Bell, he had all but two counties of South Carolina and also had forty-two counties in North Carolina. Little by little the territory was reduced until at the time of his firing he had no territory in South Carolina and only sixteen counties left in the western tip of North Carolina. Such quota and volume figures were also significant in view of the fact that an important account was taken from him in 1977 to whom he had sold over one million dollars worth of merchandise in a single year and the fact that in 1979 his largest customer was taken away from him and such customer represented $3.4 million in sales in the year before. Nevertheless, Gatlin was number one in sales volume in 1977 in the Southeast Region, number one in sales volume in the Southeast Region in 1978, and number three in sales volume in the Southeast Region in 1979. When Gatlin was fired, he was replaced by a man approximately forty-one years of age.

Gatlin had a meeting with Harold Silkworth, a vice president of Blue Bell, on July 12, 1983. On that occasion, in discussing the names of salesmen missing from the sales bulletin, Silkworth said, "It looks like Blue Bell is getting rid of all the older people. . ." Silkworth stated that George Montgomery, a former vice president of Blue Bell, was fired because of his age. Silkworth told Gatlin directly that he was fired because of his age and for no other reason. Silkworth stated, "Karl, you were fired because of your age. Your performance is well known by anyone who has been with Blue Bell in the area of sales; the records here show that, and it was well known by those people that caused you to be fired."

Plaintiff Kogut had worked for Blue Bell as a salesman in Florida since May 1, 1971. In March of 1983, plaintiffs caused a subpoena to be served on Kogut to take his deposition in the instant lawsuit, which had been filed by plaintiffs Wilhelm and Gatlin. The subpoena that was served on Kogut required him to be present for his deposition in St. Petersburg, Florida on April 12, 1983. An additional subpoena had been issued by the plaintiffs to take the deposition of another Blue Bell salesman in Jacksonville on April 11, 1983. On April 6, 1983 plaintiffs' counsel contacted Kogut by telephone and asked if it would be convenient for Kogut to come to Jacksonville on April 11, 1983 to give his deposition rather than have a number of people go from Jacksonville to St. Petersburg for his deposition. Kogut stated that it would be convenient for him to do that and the next morning notified Mr.Williams of the Blue Bell legal department and Joe Glover, his immediate supervisor, of such change.

At the time Kogut agreed to give his deposition in Jacksonville on April 11, 1983, he had no schedule conflicts with his other Blue Bell duties. Kogut testified that after he made the commitment to give a deposition, he was threatened by Joe Glover, his immediate supervisor, and told "that if I went to Jacksonville to give the deposition, as far as he was concerned, that's insubordination and grounds for termination." Nevertheless, Kogut appeared and testified at the deposition as follows:

1. that older Blue Bell salesmen were the subject of harassment and intimidation by their superiors.

2. "that guys who had been around awhile who appeared to be a little older were gone and they had a lot of new kids brought in—young guys."

3. that Kogut, himself, had been the subject of age related remarks such as: "Well, what do you expect at your age?" . . . "Well, look at Kogut he's been around here so long." . . . "Well, the oldest guy we've got here is Kogut."

4. that Bill Wise, the regional sales manager for Boys Wear stated that "the sales force was going to be a bunch of young college kids driving company Chevrolets", and also stated that "Young guys are more aggressive. They are more hungry. You older guys run out of steam and you get complacent after you've been here for awhile."

5. that Jerry Poole, President of Boys Wear, told him "You have to understand that Bill Wise is of the opinion that younger guys can do an "h" of a better job than you older guys. You guys get complacent after being around a long time."

6. that Dave Butts, presently a district manager for Boys Wear, but formerly a regional manager, stated that he had been forced by the company to fire older salesmen.

The day following his deposition, Kogut was confronted and berated by his immediate supervisor, Joe Glover, for giving the deposition, and Glover continued his tirade until Kogut told him, "my personal attorney has advised me that I don't have to take any harassment or intimidation regarding the federal deposition that I have given. I said to him, if you don't stop it, I'm going to respectfully get up and walk out." Kogut received a certified letter from Glover on May 9, 1983, regarding his attendance at the deposition:

> Hal, this action is insubordination, and is a very serious violation of company policy. Insubordination will not be tolerated. In fact, insubordination is grounds for immediate termination.
>
> Since your failure to appear in St. Pete was due to the fact that you were attending a deposition in Jacksonville, I have decided to give you the benefit of the doubt about your perception of your obligation to attend the deposition on Monday instead of Tuesday. And,

> because of this misperception, I am warning you about your insubordination instead of terminating you.
>
> Hal, let's put this problem in the past and let's work together in pursuing the goals and objectives of your territory.

Six days after receiving the letter, Kogut was fired by Glover, and Glover testified at trial that he had determined to fire Kogut at the time that he wrote the letter. Thereafter, a man twenty-eight years old was employed by Blue Bell to take Kogut's job.

At the time Kogut was fired, he was number one in the region in accomplishing percent of sales quota. Kogut was at seventy-eight percent of quota and there was approximately four and a half months left in the fiscal year:

> Q. [By Mr. Millette]: Tell me what Mr. Kogut's percent of quota was?
>
> A. [By Mr.Glover]: On May 19th, his percent of quota was seventy-eight percent.
>
> * * *
>
> Q. So you fired the top man as far as quota is concerned?
>
> A. That is correct.

At the time of his firing, he was number two in acquiring new accounts in the entire Southeast Region and had

led the region in new accounts in every year since 1978.

In September of 1981, Kogut learned that Wilhelm had been put on probation by his manager, Bill Wise. The other salesmen in the southeast region were concerned because Wilhelm was the top salesman in the region as to business accomplished. They asked Kogut, as the senior salesman, to contact Jerry Poole, the president of the Boys Wear Division, about the situation. Poole told Kogut, "Hal, you have to understand that Bill Wise is of the opinion that younger salesmen do a much better job than you older fellows. You older fellows have a tendency to become complacent after you have been around awhile and run out of steam." Thereafter, Kogut contacted Bill Wise, the regional sales manager. Wise told Kogut that Poole had accurately characterized his feelings and further stated, "that in the not too distant future, all Wrangler salesmen will be young, college boys, driving leased Chevrolets, taking inventories on big Wrangler accounts."

In late October of 1982, Kogut contacted his regional manager, Bill Wise, by telephone and advised him of competitive information where a competitor was giving extended payment terms to Blue Bell customers. Wise thanked Kogut and told him to put it in the form of a memo, stating, "That way I can pass it on to Weymouth and that way it can help the both of us. After all, we've got to try to slide you by for another two and a half years." Kogut was over fifty-two years old at the time and the early retirement date had just been changed by Blue Bell from age sixty to age fifty-five.

THIS COURT SHOULD DENY THE PETITION FOR CERTIORARI

A. This Case Presents No Special Or Important Reasons To Justify The Issuance Of The Writ

Rule 17 of the Supreme Court Rules emphasizes that review by the Supreme Court on a writ of certiorari is a matter of judicial discretion and "will be granted only when there are special and important reasons therefor." In the instant case Blue Bell asks this court to exercise its discretionary power of review in order to address the "significant federal issue" of "proper jury control in age discrimination cases." (Petition at 14). Blue Bell does not cite a conflict within the circuits nor a decision of the Fourth Circuit in conflict with a state court of last resort in support of its request for discretionary review by this court. In fact, petitioner does not point to a single case from any circuit in support of its position. Instead, Blue Bell urges this court to grant certiorari based upon its speculation that many lawyers and judges perceive that juries "may too easily and improperly be persuaded" in age discrimination cases. (Petition at 16).

Petitioner asserts that the instant case is a peculiarly appropriate vehicle for addressing the issue of "uncontrolled" juries who decide age discrimination claims on the basis of "sympathy" for the plaintiffs. Petitioner neglects to note, however, that the same jury, which was allegedly "overly sympathetic" to plaintiffs Wilhelm and Kogut, returned a verdict *against* plaintiff Gatlin. In fact, the jury determined that Blue Bell had willfully discriminated against Gatlin on the basis of his age, but refused to award him damages because it

found that he had waited too long to file his charge of discrimination with the Equal Employment Opportunity Commission. Instead of basing its verdict on sympathy, the jury scrupulously followed the trial court's instructions and refused to award damages to Gatlin even though it determined that Blue Bell had practiced willful age discrimination against him.

B. The Trial Court Correctly Denied Petitioner's Motions For A Directed Verdict And For Judgment Notwithstanding The Verdict

Blue Bell asserts in its petition that the Fourth Circuit "articulated the proper standards for review of jury verdicts" in the case of *Lovelace v. Sherwin Williams*, 681 F.2d 230 (4th Cir. 1982), but failed to adhere to those standards in the case at bar. However, the Fourth Circuit relied extensively on *Lovelace* in rendering its opinion below. *See* Appendix at 8-11, 19-20. In fact, not only is *Lovelace* consistent with the decision of the Fourth Circuit in the instant action, it virtually mandates such a ruling.

In *Lovelace* the plaintiff in an ADEA action attempted to establish his claim of age discrimination by relying only on the prima facia proof scheme established by this court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny. He was not able to produce any direct evidence of a stated purpose by the defendant to disfavor because of age nor to produce any indirect evidence whose cumulative probative force would support a reasonable probability of age discrimination. 681 F.2d at 242. In addition, after the defendant articulated a legitimate, non-discriminatory reason for plaintiff's demotion, the plaintiff was unable

to come forward with any evidence showing the defendant's stated reasons to be pretextual. In such a situation the Fourth Circuit ruled that the granting of judgment notwithstanding the verdict was proper.

The Fourth Circuit also held in *Lovelace* that direct evidence of age discrimination was sufficient, by itself, to enter a judgment for an ADEA plaintiff and to overcome a motion for a directed verdict or a judgment notwithstanding the verdict. The *Lovelace* court stated that in ruling on an evidence sufficiency motion in an ADEA action:

> The first question [for the trial court] is whether plaintiff's evidence may have carried the original production burden without need to evoke the *McDonnell Douglas* presumption. This may have occurred, for example, through direct evidence of a stated purpose to disfavor because of age . . . If this is the judicial assessment, inquiry of course ceases, no further production burdens are put in play, and the motion can be denied.

681 F.2d at 240. The *Lovelace* court later reiterated that direct evidence of a stated purpose to disfavor because of age was sufficient to support a jury verdict:

> The logical starting point in ruling upon the defendant's motion for judgment n.o.v. is to consider whether claimant may have carried his original production burden on the motivational issue without need for resort to the McDonnell Douglas presumption with all its ensuing complexities. This might

have been done by direct evidence of age discrimination . . . .

681 F.2d at 242

In the case at bar plaintiffs introduced overwhelming direct evidence demonstrating that age was the motivating factor in the discharge of each plaintiff. The uncontradicted evidence in the case demonstrated that high officials of Blue Bell on numerous occasions voiced a preference for younger employees as opposed to older employees and expressed an intention to replace older employees with younger employees. In fact, the evidence tended to show that Blue Bell acted against plaintiffs because of their age and for no other reason.

The Fourth Circuit was so impressed with the substantial quantity and quality of the direct evidence of age discrimination presented by plaintiffs at trial that it recounted the evidence at length in its opinion:

> The plaintiffs introduced ample direct evidence of age discrimination suggesting that Blue Bell fired them because of their ages. This direct evidence of age discrimination consisted of testimony relating how various Blue Bell officials had indicated an intent to replace older salesmen with younger salesmen. For example, plaintiffs introduced evidence of a conversation between Wilhelm and his immediate supervisor, William Wise, in February 1981, less than one year before Wilhelm's discharge, relating to various personnel changes in the company. Wilhelm testified that Wise told him that "eventually Blue Bell is going to

have $15,000 a year college boys for salesmen . . . . Blue Bell cannot stand these five and six percent commission rates; so, in time they will have all young college guys on a salary, being paid expenses and going around taking inventory in Blue Bell accounts."

The plaintiffs also introduced evidence of a conversation between Wilhelm and Wise in September 1981 when Wise placed Wilhelm on probation. At that time Wilhelm protested that his performance was better than the other salesmen in the Region and accused Blue Bell of being "on a youth campaign" and wanting "to get rid of the older guys and replace them with younger people." Instead of denying that accusation, Wise confirmed that he believed that "older people tend to become complacent whereas younger people generally have more drive and ambition." Wilhelm testified that Wise told him that "he was going to take care of him first and then there were going to be some others."

Kogut testified that in September or October 1981 Wise conceded that he believed that "younger salesmen do a much better job than older salesmen." According to Kogut, Wise further stated that "in the not too distant future, all Wrangler salesmen would be young, college boys driving leased Chevrolets, taking inventory on big Wrangler accounts." Kogut testified to these statements by Wise while he was a Blue Bell employee and prior to becoming a plaintiff in this case.

Wilhelm and Kogut testified that they informed Jerry Poole, the president of the Boyswear Division of Blue Bell, about the statements made by Wise that younger salesmen do a much better job than older salesmen and that the future Blue Bell salesman would be a young college boy. According to Wilhelm and Kogut, in each instance Poole responded, "That really doesn't bother me too much." At trial Poole admitted that Wilhelm and Kogut had informed him of Wise's age related remarks prior to their termination and that he had, in fact, responded to each that the statements did not bother him. Poole explained that these threats to terminate older salesmen and replace them with "college boys" did not bother him because he was not "going to let it happen." Furthermore, the uncontradicted evidence at trial established that when Poole was first informed that Wise had placed Wilhelm on probation in September 1981, five months prior to his firing, Poole responded, "you have to understand that Bill Wise is of the opinion that the younger salesmen do a much better job than you older fellows. You older fellows have a tendency to become complacent after you have been around a while and run out of steam."

Wise ceased to be Kogut's manager and was replaced by Joe Glover. The plaintiffs offered evidence that in December 1981 Glover told Kogut, Wilhelm and another Blue Bell salesmen that "Blue Bell doesn't want salesmen with good records anymore . . . . They want young

> men who can do the work for a lot less money." The plaintiffs further offered evidence that in December 1981, one month prior to Wilhelm's firing, the National Sales Manager of Blue Bell, Ed Weymeth, approached Wilhelm, Kogut and one other older salesman and said, "My God, [are] you old guys still around. I thought we got rid of you at the last sales meeting."

Appendix at 14-19.

Plaintiffs in the case at bar presented blatant, uncontradicted evidence of age discrimination—evidence that conclusively demonstrated that Blue Bell acted against each man solely because of his age. Blue Bell's assertion in the petition that the direct evidence was "ambiguous and entirely circumstantial" is simply ludicrous. (Petition at 29). The unrefuted evidence established that both Wilhelm and Kogut were informed by their immediate superior, Bill Wise, that the older Blue Bell salesmen would be replaced by young college boys. Each reported these age biased statements to the president of the division who replied in each instance, "That really doesn't bother me." The president admitted at trial that he had, in fact, responded to each that the statements did not bother him. The uncontradicted evidence showed that this same president candidly explained that Wilhelm's probation was due to the fact that his immediate superior, Bill Wise, was of the opinion that younger salesmen do a much better job than older salesmen. Four months later Wise fired Wilhelm. The evidence demonstrated that the regional manager who fired Kogut had previously told a group of salesmen that Blue Bell did not want older salesmen with good records, but rather younger salesmen who could do the

work for less money. In fact, plaintiffs offered uncontradicted evidence that during the nine-year period from 1974 to 1983 every salesman hired by Blue Bell in the southeast region was under age forty.

The legal standard for determining whether the evidence is sufficient to support a jury verdict is the same, whether it arises in the procedural context of a motion for a directed verdict or of a motion for judgment notwithstanding the verdict. 9 Wright and Miller, *Federal Practice and Procedure* §2524 at 541-42 (1971). In determining whether the evidence is sufficient the trial court is not free to weigh the evidence nor to pass on the credibility of witnesses nor to substitute its judgment of the facts for that of jury. *Tennant v. Peoria and P. U. Ry. Co.*, 321 U.S.29, 35 (1944); *Swearngin v. Sears Roebuck and Co.*, 376 F.2d 637, 639 (10th Cir. 1967). Instead, it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence. *Galloway v. United States*, 319 U.S. 372, 395 (1943). The standard for determining whether the evidence is sufficient to support a jury verdict is "whether viewing the evidence in the light most favorable to the appellee-plaintiff, there is substantial evidence to support the jury's findings." *Brady v. Allstate Insurance Co.*, 683 F.2d 86, 89 (4th Cir.), *cert. denied*, 459 U.S. 1038 (1982). The Fourth Circuit correctly ruled that the overwhelming direct evidence of age discrimination presented by plaintiffs in the instant action was sufficient to support the jury verdict:

> We conclude that there is substantial evidence in the record to support the jury's findings that Blue Bell discharged Wilhelm and Kogut

> because of their ages. The plaintiffs introduced ample direct evidence of age discrimination from which the jury could have concluded that Blue Bell fired Wilhelm and Kogut because of their ages. This direct evidence of age discrimination, if believed by the jury, was sufficient by itself to support a verdict for the plaintiffs and, concomitantly, to survive a motion for a directed verdict or a judgment notwithstanding the verdict. *Lovelace v. Sherwin Williams*, 681 F.2d at 240.

Appendix at 19.

CONCLUSION

This Court should deny the petition for a writ of certiorari. It presents no special or significant issue that would justify the exercise of this Court's discretionary power of review. The jury verdict in the case at bar was supported by abundant direct evidence of age discrimination demonstrating that petitioner proceeded against the plaintiffs solely because of their ages. This direct evidence was sufficient to support a jury verdict and to overcome a motion for a directed verdict or a motion for judgment notwithstanding the verdict.

Respectfully submitted, this 17th day of January, 1986.

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